

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

May 13, 2010

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Hawaii

Authorize the Chairperson of the Department of Land and Natural Resources to Negotiate the Terms and Conditions, and Sign a Memorandum of Agreement between the Department and Kamehameha Schools for the Remediation of Hawi No. 3 Reservoir (HI ID #00050), Hawi, Hawaii County, located at TMK Nos. (3) 5-5-003:001, 004 & 005

Applicant:

The Department of Land and Natural Resources (Department), Land Division

Legal Reference: Sections 171-6, Hawaii Revised Statutes, as amended

Location:

The Hawi No. 3 Reservoir (HI ID #00050), is situated on TMK No. (3) 5-5-003:001 (por.) owned by Kamehameha Schools and on TMK No. (3) 5-5-003:004 and 005 (por.) owned by the State of Hawaii

Background:

Act 213, SLH 2007, Item K-6, as amended by Act 158, SLH 2008 appropriated \$14,530,000 for the Dam Assessments, Maintenance and Remediation Improvements, Statewide, for the purpose of satisfying the State's obligations under Act 262, the "Hawaii Dam and Reservoir Safety Act of 2007". The purpose of this Act is to provide for the inspection and regulation of construction, enlargement, repair, alteration, maintenance, operation and removal of all dams and reservoirs to protect the health, safety, and welfare of the citizens of the State by reducing the risk of failure of all dams or reservoirs.

Governor's Memorandum, dated December 18, 2009, delegated this funding to the Department of Accounting and General Services (DAGS). Since the Department, through its Engineering Division's Dam Safety Program, is responsible for the inspection and regulation of all of the State's dams and reservoirs, DAGS Public Works Division was delegated the responsibility for managing the assessment, repair, alteration and/or removal of the dams and reservoirs under the Department's jurisdiction because there appeared to be the potential for a "conflict of interest" for the Department to also be

responsible for the party conducting the actual assessment and remediation of these dams and reservoirs.

Part of this \$14,530,000 funding is to remediate the Hawi No. 3 Reservoir (Structure), which is jointly owned by the State of Hawaii (State) and Kamehameha Schools (KS), collectively, the "Parties". DAGS Project Management Branch contracted a consultant to design three alternatives for the Parties' consideration: removal of the Structure, full remediation of the Structure, and storage reduction of the Structure. Upon careful review and realizing the State's and KS's budgetary constraints, the Parties decided on storage reduction of the Structure and agreed to cost-share in the construction remediation project. Attached is a "draft" copy of the Memorandum of Agreement, which delineates the responsibilities of both Parties for the construction, maintenance and repair of the dam and reservoir on a go-forward basis. It also includes disbursement of KS's contribution that would be received prior to June 30, 2010.

Recommendation that the Board:


Authorize the Chairperson to negotiate terms and conditions, and sign on behalf of the Department and the Board of Land and Natural Resources (Board) a Memorandum of Agreement between the Board and KS, subject to review and approval as to form by the Department of the Attorney General.

Respectfully Submitted,



Lydia M. Morikawa  
Special Projects and Development Specialist

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
Laura H. Thelen, Chairperson

Attachment

**MEMORANDUM OF AGREEMENT**  
**OPERATIONAL REDUCTION OF HAWI NO. 3 RESERVOIR**  
**TMK: (3) 5-5-003:001, 004 and 005**  
**("Agreement")**

THIS AGREEMENT is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2010, by and between the STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES, by its Board of Land and Natural Resources ("State") and KAMEHAMEHA SCHOOLS ("KS") collectively, the "Parties".

This Agreement is designed to promote increased understanding, cooperation, and interaction, and to provide basic principles and guidelines for the Parties to participate in the planning, design, and construction of the operational reduction of the Hawi No. 3 Reservoir.

**RECITAL**

A. Hawi No. 3 Reservoir (the "Structure") is located in Hawi, Hawaii County, and jointly owned by the State and KS (see Exhibit A). The location of this reservoir is identified as:

- 1) Tax Map Key No. (3) 5-5-003:001 - KS and
- 2) Tax Map Key No. (3) 5-5-003:004 and 005 - State

B. The State, through the Department of Land and Natural Resources, Engineering Division, contracted LFR, Inc. to complete a Final Phase I Inspection Report of the Hawi No. 3 Reservoir (February 2, 2009). The report determined the Structure was in POOR condition and further study was necessary to evaluate the safety of the dam. As a result of this report, the State initiated a contract for consultant services to provide design alternatives for the Structure. Alternatives included: a) removal of the Structure, b) full remediation of the Structure, and c) the reduction of the Structure's storage capacity.

C. After careful review of the design alternatives, the Parties mutually agreed to the reduction of the Structure's storage capacity, (i.e., operational reduction of the Structure), for the following reasons:

- 1) The Structure is maintained at a reduced risk from failure;
- 2) Limited water storage and water rights are preserved;
- 3) Irrigation supply is maintained during dry periods;
- 4) Long-term operations and maintenance costs associated with a larger dam are avoided;
- 5) Potential for restoring the full reservoir at a later date is preserved; and
- 6) The cost is one-third (33%) of the cost of full remediation

D. The operational reduction project (the "Project") of the Structure shall include the following improvements:

- 1) Lowering of the spillway providing suitable storage capacity and to safety pass the probable maximum flood flow, as required by the State's Dam Safety Program;
- 2) Installation of an outlet valve, elevation gage and telemetry;
- 3) Replacement of a 30-inch pipe culvert under the access road and the concrete structures at its downstream end;

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- 4) Repair of the outlet channel, spreader apron, and inflow feeder channel from the Kohala Ditch to the 30-inch culvert;
- 5) Clearance and grubbing of eroded areas and removal of any remaining trees and regarding the embankment slopes; and
- 6) Installation of erosion and sediment control measures.

E. The Parties desire to document their agreement of the terms and conditions upon which KS will provide contribution to this Project, since the Structure is located on lands owned jointly by both the State and KS.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the Parties hereby agree as follows:

1. Contribution: KS agrees to contribute to the State \$650,000.00 ("KS Contribution") toward the costs of the Project, upon and subject to the terms and conditions set forth in the Agreement, including the possible adjustment of said amount as provided in Section 3 below. KS Contribution will be encumbered by the State no later than June 30, 2010, and will remain in an escrow account until construction commences. The State shall match, in equal amounts any further monetary contribution made by KS, in excess of the KS Contribution, towards the satisfactory completion of the Project, as may be needed, subject to availability of funds and Legislative approval, if necessary.

2. Bid Opening: Not later than five (5) working days following the date of bid opening, the State shall notify KS in writing as to whether the fund available to the State to cover all Project costs are sufficient for the State to make an award to the lowest qualified bidder. If the bid opening reveals that the State would have insufficient funds to complete the Project, the State shall deliver to KS a written proposal to make reasonable reductions to the scope of work of the Project so that the funds available to the State would be sufficient to cover all costs of the Project, as so modified.

3. Return of Funds: Any unused funds comprising all or any portion of the KS Contribution shall be returned to KS as set forth below:

a. If for any reason the State is unable to award the Project, the State shall provide written notification to KS and shall promptly return the entire KS Contribution to KS in full.

b. If the bid opening reveals that the State has insufficient funding to initiate the Project, and the State and KS are unable to agree upon a reduction in the scope or work, the State shall promptly return the entire KS Contribution to KS in full.

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c. If for any reason the Project is awarded but there are circumstances, which arise that prevent or otherwise make impracticable its completion, the State shall promptly return any unused portion of the KS Contribution to KS.

d. If after the State's final acceptance of the Project and the State's final payment to the Contractor there are unused funds, the State shall promptly return any unused portion of the KS Contribution to KS.

4. Responsibility for Permits and Approvals: The State shall be solely responsible for obtaining all permits and approvals required for and complying with all laws applicable to the Project.

5. Access: KS shall provide the State and its Consultant with reasonable access to KS property to perform the necessary work on the Project. Upon completion of the Project, the Parties agree to provide access to each other's property for operational and maintenance purposes.

6. Operations and Maintenance: The Parties agree to abide by the recommended "Operations and Maintenance Plan" that will be provided by the Consultant, and use their best efforts to work together to ensure that the Structure is properly maintained.

7. Miscellaneous Conditions:

7.1. This Agreement shall be effective upon its full execution by the Parties.

7.2. It is expressly understood and agreed that the failure of either party to insist in any one or more instances upon strict performance of any of the terms and conditions of this Agreement, or to exercise any rights herein conferred, shall not be deemed a waiver or relinquishment of any of the other party's right to assert or rely upon such terms, conditions, or rights in any other instance.

7.3. This Agreement shall be governed by the laws of the State of Hawaii.

7.4. This Agreement may be amended only by the written agreement of the Parties hereto.

7.5. Each provision of this Agreement is severable from any and all other provisions of this Agreement. Should any provision, clause or portion of this Agreement be deemed illegal, void, or unenforceable for any reason, the remaining portions of this Agreement shall remain in full force and effect.

7.6. Binding Effect. Upon execution of this Agreement by both Parties, the Parties shall cooperate and negotiate in good faith conditions and terms to complete and execute the definitive documents and instruments necessary to accomplish the intended goals of this Agreement. Terms and conditions of any future agreement shall be consistent with this Agreement and upon such other terms as the Parties shall agree.

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IN WITNESS WHEREOF, the State and KS have executed this Agreement as of the date first  
above written.

Approved as to Form:

By \_\_\_\_\_ Date \_\_\_\_\_  
Deputy Attorney General

STATE OF HAWAII, BOARD OF LAND AND  
NATURAL RESOURCES

KAMEHAMEHA SCHOOLS

By: \_\_\_\_\_  
Name: Laura H. Thielen  
Title: Chairperson

By: \_\_\_\_\_  
Name:  
Title:

Approved by the Board of Land and Natural Resources  
at its meeting held on \_\_\_\_\_

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**Exhibit A**

**Location of Hawi No. 3 Reservoir; TMK: (3) 5-5-003:001, 004 and 005**

